Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, Scott, and Swanson

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Subject: Payments for "Member Communications:" Discussion of Section 85312 Issues

Date: January 4, 2001

I. Introduction

Payments for communications supporting or opposing a candidate or ballot measure typically are reportable "contributions" or "expenditures" under the Political Reform Act (the "Act").[1] (Sections 82015 and 82025.)[2] Section 85312, enacted by Proposition 34 and later amended by Senate Bill 34, appears to provide an exception to this general rule for payments made for "member communications."[3]

As amended, section 85312 provides:

> For purposes of this title, payments for communications ~~for purpose of this title~~ to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or ~~independent~~ expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. However, payments made by a political party for communications to its members who are registered with that party which would otherwise qualify as contributions or expenditures shall be reported in accordance with Article 2 (commencing with Section 84200) of Chapter 4, and Chapter 4.6 (commencing with Section 84600), of this title.

Uncertainty concerning the scope of this section has prompted much discussion regarding its application. To ascertain the concerns of the public, staff held four interested persons' meetings on section 85312 in May, August and December of 2001.

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[1] All references are to the Government Code.

[2] Sections 82015 and 82025 provide the definitions for contribution and expenditure respectively. These sections are further interpreted by regulations 18215(a)(1) and 18225(a)(1).

[3] "Member communications" refers to communications to members, employees, and shareholders of an organization or families of those persons.

Staff noticed regulations prescribing the scope of the exception and defining various terms used in the statute. However, staff found that the regulations, as the statute itself, did little towards identifying the duties of the persons who *pay* for the communications referenced in the statute ("payers"). It is those persons, whose obligations under the Act may be affected by the statute and whose identification is critical in determining the scope of section 85312, that are the focus of this memorandum.

This memorandum summarizes the issues and presents several options for possible regulatory action that would clarify the scope of section 85312. In Decision 1, the Commission is asked by the staff to determine whether the exception of section 85312 may be construed **narrowly** as:

> 1) applying to payers other than existing committees, in which case the statute resulted in no change for committees from pre-existing law (the "exclusion approach") or
> 2) an expansion of the Commission's newsletter exception (the "newsletter exception approach")

or whether the exception should be construed **broadly**. This memorandum is devoted almost exclusively to this critical issue. Under the first option, the Commission is asked to determine whether all committees should be treated the same or whether "major donor" and "independent expenditure" committees should be treated differently from recipient committees.

The remaining part of the memorandum pertains to definitions implicating smaller but important details of construction concerning the various terms of the statutes. Also, for enforcement purposes, recordkeeping requirements and a safe harbor provision are discussed. Other decision points pertain to political party issues and earmarking of payments by third parties, and the possible interaction of section 85310 with this section.

Specifically, the structure of the memorandum is as follows:

- This memorandum first summarizes reporting rules and explores whether this section is ambiguous as to whom its provisions apply. If the Commission finds that section 85312 contains no ambiguity, then the Commission should apply the plain meaning of the statute. One possible plain meaning is that the section is to be applied broadly to all types of persons. Such a broad application of this section would most likely impact the Act's reporting rules resulting in decreased disclosure. For example, it is possible that committees (considered "persons" under the Act) would no longer have to comply with the requirement that any payment made by a committee must be disclosed to the public.

- If the Commission determines that section 85312 is ambiguous in its breadth and scope, a review of legislative intent and history, along with other extrinsic evidence is presented to help determine the next course of action.

In the part of the memorandum that discusses Decisions 1 and 2, the following specific issues are discussed:

- To the extent section 85312 provides for an exception, what is the nature of the exception?

- Are committees "organizations" subject to the exception or are committees outside the scope of section 85312 altogether?

- If committees are determined to be within the scope of section 85312, how broad is the exception? Is the exception limited to existing exceptions under Commission regulations for internal newsletters?

- If committees are determined to be outside the scope of section 85312, do pre-existing rules applicable to committee formation and reporting still apply? Should all types of committees be treated the same?

- How does the distinct treatment of committees of a political party under the Act alter the analysis?

Decisions 3 – 7 then discuss the following:

- Are special rules against earmarked payments for communications by third parties necessary to prevent circumvention of the Act's contribution and voluntary expenditure limits?

- In addition to the term "organization," should terms such as "member," "employee," "shareholder, and "family" be specifically defined in regulations?

Having evaluated these issues, the Commission is asked to specifically determine if staff should draft language consistent with its views regarding the breadth and scope of the exception as discussed in the decision points. A final option (discussed under Decision 1) is that section 85312 must be read broadly but that it should seek further clarification through the legislative process.

II. Background

A. Reporting Requirements

Since section 85312 introduces exceptions to the existing definitions of "contribution" and "expenditure," which affect the formation of "committees," it makes sense to begin by

reviewing those portions of the Act most affected by this statute, as they existed just prior to the enactment of Proposition 34.

The campaign provisions of the Act apply to candidates and committees. As defined in section 82013, "committee" means any person or combination of persons who directly or indirectly does any of the following:

> "(a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year.
> (b) Makes independent expenditures[4] totaling one thousand dollars ($1,000) or more in a calendar year; or
> (c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees." (Section 82013.)

Persons who receive contributions as described in subdivision (a) become "recipient committees." Persons who qualify under subdivision (b) are "independent expenditure" committees, and persons who qualify under subdivision (c) are known as "major donor" committees. [5]

Both a contribution and an expenditure include a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not *made for political purposes*. (Sections 82015 and 82025.) A payment is made for political purposes if it is, in part, for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification or passage of any measure. (Regulations 18215 and 18225.)

In addition, a contribution is deemed to be made for political purposes if it is *received by or made at the behest* of the following:

- A candidate;
- A candidate controlled committee;
- A political party; or

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[4] "Independent expenditure" means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee. (Section 82031.)

[5] Note that major donor and independent expenditure committees need not *receive* contributions to be "committees."

- An organization formed or existing primarily for political purposes, which includes political action committees established by membership organizations, labor unions or corporations. (Reg. 18215(a)(1), (2).)

An expenditure is also deemed to be made for political purposes if it *is made by*:

- A candidate;
- A candidate controlled committee;
- A political party; or
- An organization formed or existing primarily for political purposes, which includes political action committees established by membership organizations, labor unions or corporations and organizations existing primarily to influence or attempt to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure. (Reg. 18225(a)(2).)

Since section 85312 concerns communications to certain persons of organizations, it is important to identify who the payer is under the statute because the section arguably carves out an exception to the "political purposes" presumptions that exist relevant to "committees," as defined in section 82013. This becomes critical in that such characterization implicates committee formation, disclosure, and contribution and expenditure limit issues.[6]

On the other hand, certain regulatory exceptions to the definitions of "contribution" and "expenditure" support an alternative analysis. Under this analysis, the new law would merely be viewed as a codification (in expanded form) of current Commission regulations concerning internal member communications. Specifically, regulation 18225 currently provides what is referred to as the "newsletter exception":

> "…the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:
> (A) A regularly published newspaper, magazine or other periodical of general circulation which routinely carries news, articles and commentary of general interest.
> (B) A federally regulated broadcast outlet.

[6] With respect to reporting, committees must file campaign statements pursuant to sections 84200 – 84204 of the Act, including on each campaign statement particular information required by section 84211. Specifically, section 84211(b) requires disclosure of the total amount of expenditures made during the period covered by the campaign statement, and the total cumulative amount of expenditures made. In addition, section 84211(k) requires a committee to itemize expenditures and to give a description of each payment.

> (C) A regularly published newsletter or regularly published periodical, other than those specified in paragraph (b)(4)(A), whose circulation is limited to an organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication…." (Regulation 18225(b)(4).)

As a result of this exception, a person making payments solely for these costs does not qualify as a committee under section 82013 by virtue of the payments; i.e., they do not trigger committee formation. Regulation 18215(c)(9) provides for a similar exception for contributions.

Independent expenditure and major donor committees ("(b) and (c) committees") do not disclose these payments. Since independent expenditure committees and major donor committees are created on a calendar year basis, they are *not* required to report all of their ongoing financial activities. Even if qualified as a committee for that calendar year, payments that fall under the newsletter exception have never been deemed reportable for (b) and (c) committees. In other words, if a payment falls under the regulation 18225(b)(4) exception above, the payment would not be "qualifying" and would not be reportable. (Regulation 18225; *White* Advice Letter, No. A-00-140; *Bagatelos* Advice Letter, No. I-87-234; *Nielsen* Advice Letter, No. A-76-520.) The newsletter exception has less effect on recipient committees, which by their nature engage in the essentially political activity of raising and accepting contributions. In contrast to (b) and (c) committees, any payment made by a recipient committee formed pursuant to section 82013(a) is an "expenditure" and is fully reportable under the Act's disclosure provisions. Recipient committees are required to file periodic reports disclosing all payments made (i.e., expenditures), and all payments received. (Sections 84200-84204, 84211; *Betancourt* Advice Letter, No. I-88-212; *Karnette* Advice Letter, No. A-87-192.) This reporting by a recipient committee is required[7] despite the newsletter exception. (Regulation 18225(b)(4).)

The "newsletter exception" to the definition of "expenditure" discussed above has obvious similarities to the new exception provided by section 85312. The "newsletter exception," the third in a list of three exceptions described at Regulation 18225(b)(4),[8] governs regularly published "newsletters." This exception was adopted by the Commission in 1976 to prevent *private* communications, not intended for general circulation, from triggering committee formation. A letter to the Commission explained the rationale for this exception:

> "Many membership organizations, unions and corporations publish regular newsletters, the expenditures for which are incurred without regard to their specific content. Where such a publication

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[7] Persons that are recipient committees and make payments for these costs are required to make an itemized disclosure of these types of payments of $100 or more as part of the committee's cash balance reporting. (Sections 84211(e) and (k).)

[8] The other two exceptions of govern newspapers of general circulation, and federally regulated broadcast outlets.

> includes an article on a candidate or measure, and where the publication of such article does not result in any incremental expenditures by the organization, we believe such publication should not give rise to a reporting obligation. Such a reporting obligation would give a false impression that large sums were specifically expended for printing and mailing costs on behalf of a campaign, when in fact no costs would have been incurred beyond those that would have been incurred in any event. Moreover, a requirement to report such costs would cause many membership organizations, unions and small- or medium-sized businesses to become 82013(b) committees even though they had no other political expenditures or involvement. We do not believe the Act was intended to produce such a result for such limited forms of communication."[9]

This early exception to the definition of "expenditure" successfully struck a balance between an organization's right to privacy in its internal communications and the public interest in disclosure of the activities of "committees" regulated by the Act. This exception was incorporated into the definition of "contribution" in 1995.

Once qualified, major donor and independent expenditure committees continue to benefit from this exception insofar as they need not report any expenditures on communications that take the form of regularly published newsletters otherwise meeting the criteria specified in the "newsletter exception."

If the new statute is interpreted to alter this analysis, it may mean several things: (1) that (b) and (c) committees have a broader exemption in terms of triggering committee formation; (2) that nothing changes for these committees; or (3) that the prior Commission's rules have been altered to limit the prior exceptions.

B. Question Presented in Light of Existing Commission Rules

The question presented is whether section 85312 should be interpreted narrowly (under either a "exclusion approach" or "newsletter exception approach") or whether the exception is broader, intended to exempt payments made by committees entirely from reporting. If so, a number of issues are implicated. Among them are how committees will keep track of reportable and non-reportable payments that may trigger contribution and expenditure limits. The issue, then, turns not only on what is exempt from reporting but how the Commission will ensure there is no erosion of the contribution and expenditure limits created by Proposition 34.

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[9] Letter to Chairman Lowenstein from Robert W. Naylor for Pillsbury, Madison & Sutro, April 13, 1976.

One way to view the exception narrowly is to conclude that the payers affected by section 85312 are organizations not organized as committees (i.e., section 85312 applies only to organizations not organized for political purposes). Committees would simply be viewed as being outside the scope of the statute and its exception. If applied to all committees organized under section 82013, this "exclusion approach" would mean the statute has no effect on pre-existing rules for committees.

The statute may also be construed as including committees within its scope as payers, but providing that the section merely serves to codify the "newsletter exception." Interpreting the exception of section 85312 under a "newsletter exception approach" would provide a narrow interpretation.[10] Additionally, it is the staff's view that the section refers to payments for internal communications only and specifically provides that certain payments, such as payments for billboards and advertising are not within the scope of the section 85312 exception.

In contrast, under a broad approach, committees would fall within the scope of section 85312 and would no longer have to report payments which, pursuant to this section, would no longer be "contributions" or "expenditures." To apply section 85312 broadly would greatly affect a number of areas of the Act including disclosure, limits on contributions, and voluntary limits on expenditures. Moreover, a broad application of this section would most likely impact the Act's reporting rules resulting in decreased disclosure. For example, it is possible that committees no longer have to comply with the requirement that any payment made by a committee be disclosed to the public.

Implications of section 85312 are significant because the communications are not limited to members, shareholders, and employees of organizations; "families" of these persons are included within the scope of the exception. Therefore, to the extent any payer would be included in the exemption and the term "family" broadly construed, this section has the possibility of severely undermining any reporting of contributions and independent expenditures that currently are reportable due to their express advocacy of candidates and ballot measures.

Staff favors an approach that would least alter existing rules and which is consistent with the rest of Proposition 34. Moreover, since the provision is not limited to state candidates and measures, some local jurisdictions view their local ordinances as being negatively impacted. (See *In re Olson*, O-01-112.) Though the Commission cannot address every issue raised by local ordinances, it may be possible to limit negative impacts with a narrow construction of the statute.

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[10] It is well settled, as a general principle, that exceptions in a statute are to be narrowly construed. (*Korean American Legal Advocacy Foundation* v. *City of Los Angeles, et al.* (1994) 23 Cal.App.4th 376, 396, citing *National City* v. *Fritz et al.* (1949) 33 Cal.2d 635.)

III. Statutory Construction Issues Scope of Section 85312

A. Rules of Statutory Construction

In construing section 85312, the Commission should proceed along the lines followed by courts charged with interpreting a statute, succinctly summarized in *Estate of Griswold* (2001) 25 Cal.4th 904, 911, as follows:

> "We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citations omitted.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.] If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation omitted.] In such cases, we select the construction that comports most closely with the apparent intent of the Legislature, with a view of promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."

Where the language is clear, its plain meaning should be followed. (*Great Lakes Properties v. City of El Segundo* (1977) 19 Cal.3d 152, 155.) The Commission should first determine whether section 85312 is unambiguous, by examining the usual and ordinary meaning of its text. If the Commission concludes the section is unambiguous, the plain meaning of the statute governs and no further interpretation is required.[11]

B. Plain Meaning Argument

Some members of the public urge that section 85312 be interpreted to remove from regulation *any* payment for what would otherwise be a communication to "members … of an organization." Proponents of this approach view the constitutional right of freedom of association as being sufficiently broad to warrant this broad exception. They do not contend, however, that disclosure requirements prior to Proposition 34 that continue to be in effect are unconstitutional.[12] Their desire, in a nutshell, is that key terms undefined in the statute be

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[11] When the language of a statute is "clear and unambiguous," and thus not reasonably susceptible of more than one meaning, there is no need for construction and courts should not indulge in it. (*People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1391.)

[12] This reporting obligation is aptly described by the California Laborers for Equality and Progress: "Where the membership organization is itself a committee, Cal-LEAP submits that the expenditure should only be listed on the Schedule E of the organization's Form 460 to the extent the committee would be required to report other overhead expenses, such as rent or employee compensation. (Zakson Comment Letter, August 15, 2001.)

defined broadly *to reduce*,[13] but not eliminate, reporting obligations of "organizations" under the Act's purview.

An equally important concern of these persons is that payments for the communications governed by this section should not be subject to contribution limits. In relation to this issue, some have mentioned the ruling in a preliminary injunction filed on May 19, 1989 in the case of *Service Employees International Union, et al v. Fair Political Practices Commission* (1992) 955 F.2d 1312, which enjoined some of the Commission's enforcement of Proposition 73 provisions. Among the matters enjoined in this case was the Commission's duty to enforce Proposition 73 contribution limits to the extent that these limits interfered with a membership organization's ability to communicate with its members. On this point, staff notes the "newsletter exception" was in effect at the time the Proposition 73 contribution limits for special elections were in effect (prior to implementation of Proposition 34). Whether Proposition 34 contribution and expenditure limits apply to these communications is an issue the staff can further explore, but this issue does not address committee formation and disclosure issues.

C. Ambiguity Argument

The plain meaning argument has the considerable appeal of simplicity, but that simplicity conceals numerous problems. Staff does not believe it is proper to confine interpretation of section 85312 in this manner since section 81003 of the Act requires that the Act should be "liberally construed to accomplish its purposes." The very first of these "purposes," enumerated at section 81002, specifies that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Consequently, to "liberally construe" section 85312 in a manner that would accomplish the Act's essential purpose requires that any *exception* to the definition of "contribution" and "expenditure" be *narrowly* construed.

The fundamental rule conveyed by this section is that "… payment for communications … supporting or opposing a candidate or a ballot measure … are not contributions or expenditures …" A number of the Act's rules are based on the identification of certain payments as contributions or expenditures such as committee formation, campaign disclosure, and contribution limits. The statute's introductory language "for purposes of this title" refers to the entire Act and would seem to require, for example, that section 85312 apply in the same manner for purposes of disclosure and contribution limits (which are contained in separate articles).

The challenge is to determine whether the Commission may properly construe the exception narrowly given the text of the statute. Section 85312 presents text which seems on its face to be clear and unambiguous. Since the text of this section's first sentence does not identify who makes the payments contemplated by the provision, it is possible to conclude that this

[13] The reduction in disclosure would translate into reporting cumulative payments for "member communications" of the type beyond those described in the "newsletter exception."

section has a generic application which is quite broad.

However, in the context of the Act, the most fundamental step in assessing any questions regarding the payments of the first sentence of section 85312 is identifying the payer. This step is necessary in determining who must file a report or who has or has not exceeded contribution or voluntary expenditure limits. Unlike the second provision of this section that expressly identifies "payments *made by* a political party," the general rule of section 85312 is ambiguous as to whom it applies.[14] In this sense, the statute has a patent ambiguity.

The courts have held that statutory language that seems clear when considered in isolation may in fact be ambiguous when considered in context. (*National Technical Systems v. Commercial Contractors* (2001) 89 Cal.App.4th 1000; *Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366; see also *Stockton Sav. & Loan Bank v. Massanet* (1941) 18 Cal.2d 200.) If the Commission finds that it is unable to determine from the text of section 85312 to whom the section applies, the Commission may then turn to customary rules of statutory construction or legislative history for guidance.[15] Staff believes this is proper as further discussed below.

1. Evidence Bearing on Legislative Intent

As noted in *Griswold,* when the express terms of a statute do not clearly demonstrate its intended effect, the Commission may look to extrinsic evidence of legislative intent "with a view of promoting rather than defeating the general purpose of the statute." This extrinsic evidence may be found through an examination of voter pamphlet materials to determine voter intent, the legislative analysis and arguments of support for Senate Bill 34 ("SB 34"), and the identified statutory purposes of the Act.

In its original form, section 85312 was enacted as part of a ballot measure, and the "Legislature," whose intent must be gauged, is the electorate. The materials placed before the voters, especially the official Ballot Pamphlet, are usually the most reliable indicia of voter intent. The Official Voter Information Guide for the November 2000 election (containing the official summary of Proposition 34, as well as the ballot arguments for and against the measure), stated that the measure "expands public disclosure requirements," but did not specifically address provisions of section 85312. We can therefore say that, in voting for Proposition 34, the voters intended generally to expand disclosure under the Act. However, these materials do not furnish information more specific to intent underlying the enactment of section 85312.

An examination of the legislative history of SB 34 provides some guidance on this issue to the extent that supporters believed the bill generally enhanced disclosure. When it first

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[14] As noted above, the various terms such as "families" are also not defined.

[15] If language that appears unambiguous on its face is shown to have a latent ambiguity, a court may turn to customary rules of statutory construction or legislative history for guidance. (*In re Jeremy S.* (2001) 89 Cal.App.4th 514; *Quarterman v. Kefauver*, *supra*.)

considered the statute earlier this year, the Commission understood section 85312 to have a practical effect of greatly reducing, but not eliminating, the reporting obligations of political party committees.

As passed by the voters in Proposition 34, section 85312 initially provided that payments for communications to "members, employees, shareholders, or families of members, employees, or shareholders" of an organization, for the purpose of supporting or opposing a candidate or a ballot measure, were not contributions or *independent* expenditures, provided those payments are not made for general public advertising.[16]

In its May 15, 2001, letter to the Commission requesting an Opinion, in significant part, on section 85312, prior to its amendment by SB 34, the California Democratic Party ("CDP")[17] wrote:

> As a practical matter, this means that although an organization which qualifies as a committee under the PRA may be required to file periodic (*e.g.*, semi-annual) campaign disclosure statements itemizing its contributions and expenditures, to the extent it makes expenditures for member communications supporting or opposing candidates it is not required to attribute those expenditures to any particular candidate nor does it incur additional reporting obligations as a direct result. An organization which is engaged only in member communications (such as many nonprofits and labor unions) is not required to file such disclosure statements. … As a state filer, CDP is required to file periodic reports which contain *all* its contributions and expenditures. This includes expenditures for member communications.

In short, the Parties understood that section 85312 did not exempt them, as existing committees, from existing disclosure obligations, while the provision *did* operate to prevent formation of new committees merely by reason of member communications and to reduce the level of reporting for committees. The Commission agreed with this interpretation in its *Olson* Opinion, issued on July 9, 2001.

After the *Olson* Opinion was issued, the Legislature amended section 85312 as part of SB 34. SB 34, chaptered on September 4, 2001 as an urgency measure, amended section 85312, by striking the word "independent," providing that payments for section 85312 communications are not considered "expenditures," as opposed to the "*independent* expenditures" originally

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[16] Section 85312 was thought to reduce disclosure of these payments because they would no longer be reported as contributions or independent expenditures but, rather, as ordinary expenditures.

[17] California Republican Party joined in this opinion request and analysis. (Letter to Commission General Counsel from Douglas R. Boyd, Sr., May 17, 2001.)

referenced by Proposition 34.

The legislative history of SB 34 reaffirms Ballot Pamphlet statements indicating that the intent was again to enhance disclosure. This was understood by those who supported the bill, including the Commission.[18] (Also see *Olson* Opinion, footnote 13.) Staff subsequently noted that deletion of the term "independent" from the statute was intended to ensure that payments for these communications are non-reportable for organizations that do not *otherwise* qualify as political committees.[19]

Also important is the SB 34 amendment of May 17, 2001 to increase disclosure of member communication payment by political parties. The amendment proposed at that juncture specified that an organization would include an organization's sponsored committee. However, that language was deleted in the June 4th amendment of the bill. Staff believes deletion of that proposed amendment is further evidence that reduced reporting by committees was never intended.

In construing this statute, a court would also look to the "ostensible objects to be achieved" by the Act. (*Estate of Griswold, supra.*) To that end, the principle that receipts and expenditures in election campaigns should be fully and truthfully disclosed supports the application of section 85312 to paying organizations that are not otherwise "committees" under the Act.

2. Scope of Statute – Decision Point 1

The following is a summary of Decision Point 1 issues:

Decision 1: What is the scope of section 85312?

> **Option 1A: Broad Approach.** Section 85312 should be read to relieve all existing committees from disclosure obligations relative to member communications.

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[18] The Commission sent letters supporting SB 34 twice to Senator Burton, the bill's sponsor, on June 12 and July 11, 2001, and a third letter to the Governor on August 29, 2001. The League of Women Voters also sent a letter supporting the bill, included in the June 6, 2001 bill analysis for the Assembly Committee on Elections, Reapportionment and Constitutional Amendments, stating; "[t]he League supports campaign finance practices for candidates and advocates of ballot measure positions which will ensure full disclosure of campaign contributions and expenditures."

[19] June 7, 2001 Senate Bill 34 Legislative Bill Analysis submitted by staff to the Commission. The Legislature may be presumed to have been aware of the Commission's analysis of SB 34 as it evolved over much of the year, as well as the Commission's understanding of section 85312 reflected in the *Olson* Opinion.

Option 1B: Narrow Approach. Based on the extrinsic evidence, section 85312 should be read narrowly:

Option 1B(i): "Exclusion Approach." The statute should be construed to exclude committees from the scope of the exception. As a result, committees would continue to be subject to prior disclosure rules. This approach could also result in the elimination of the newsletter exception for any (b) and (c) committee, which as discussed above, has served to prevent committee formation for these committees since 1976.

Option 1B(ii): "Newsletter Exception Approach." Section 85312 should be construed as an expanded codification of the newsletter exception for additional internal communications subject to the exception under the new statute.

Option 1C: Legislative Clarification. Having considered the issues, the Commission should direct the staff to seek further clarification of section 85312 through the legislative process.

Decision Point 1 Discussion

Option 1A: Broad Approach. Since the text of section 85312's first sentence does not identify who makes the payments contemplated by the provision, it is possible to conclude that this section has a generic application which is quite broad (i.e., application is not limited or qualified in any way). However, in consideration of the Commission's past determinations in its disclosure regulations and the cited advice letters, a broad application of section 85312 to all persons, including those which are recipient committees, would contravene current reporting rules.

Option 1B(i): Exclusion Approach (Narrow). This option would keep intact the disclosure rules of the Act by providing that persons making payments pursuant to section 85312 are limited to organizations which are *not* committees and therefore not subject to the Act's reporting rules as discussed above. This view promotes disclosure by limiting the number of persons who can "make" payments without reporting. This was the approach taken in the noticed regulations. Proposed regulation 18531.8 provides in relevant part:

> [For purposes of Government Code section 85312, the following provisions apply to an organization , as defined in 2 Cal. Code Regs. Section 18531.7, that is not a committee under [subdivision (a) of Government Code section 82013][Government Code section 82013;]]

By excluding all committees under section 82103 (second bracketed language) from the scope of the statute, the Commission under this first narrow approach could provide that the newsletter exception, that has served to trigger committee formation for (b) and (c) committees, no longer applied. This would constitute a reversal of long-standing Commission policies, however.

If the Commission selected to exclude only recipient committees from the scope (first bracketed language), the newsletter exception for (b) and (c) committees would be retained. Also, retained would be the current rules that recipient committees must report all expenditures made once established as this type of committee. Excluding only recipient committees would also retain current disclosure by recipient committees, which is critical to facilitating audits and ensuring compliance with the personal use restrictions and the Act's new contribution and expenditure limits.

Option 1B(ii): Newsletter Exception Approach (Narrow). As addressed in the "Reporting Requirements" section of the memorandum, regulations 18215 and 18225 contain exceptions to the definitions of contribution and expenditure which closely parallel the provisions of section 85312. The primary difference is that the relevant exceptions are limited to payments associated with a "regularly published newsletter" or periodical. In contrast, section 85312 applies to a broader range of communications. As such, section 85312 may be viewed as codifying the newsletter exception, albeit in an expanded manner because the relevant communications would not be limited to newsletters and periodicals. Therefore, this approach would have the effect of reducing current reporting requirements.

This approach has the same practical effect as the first option if the Commission selected to retain the current committee formation rules for (b) and (c) committees. However, the implications for these committees is slightly different because the type of communications that no longer trigger formation would be expanded. Since the newsletter exception has operated to prevent committee formation for independent and major donor committees, these committees would not be required to report any payments for communications described in section 85312, which, as discussed above, include more communications than those covered under the "newsletter exception."

Option 1C: Legislative Clarification. The Commission may choose this option and direct the staff to work on further legislative amendments. If the Commission chooses this option, it may stop here or direct the staff to consider other issues outlined below in Sections IV – VI of this memorandum. The proposed legislative amendments would focus on identifying who the payer is under the statute and specifying whether the reference to "for purposes of this title" is meant to alter committee formation and disclosure rules under the Act.

Decision 1: What is the scope of section 85312?

Decision 1 Staff Recommendation: If read to apply broadly to all persons including recipient committees, section 85312 would directly conflict with the reporting rules of sections 84200 – 84204 which require the reporting of any expenditure (*i.e.*, any payment) made by a recipient committee. Applying the exception of section 85312 to committees formed pursuant to section 82013 alters the Act's 25-year rule requiring recipient committees to report all expenditures. (See section 84210 of the 1974 Political Reform Act, now section 84211.) Staff, therefore, does not recommend the broad approach.

Staff makes no recommendation but points out that **Option 1B(i)** could result in the broadest disclosure for committees because it eliminates an exemption (b) and (c) committees have had for 25 years. If the Commission decides to exclude all committees from the scope of section 85312, these committees would no longer benefit from the newsletter exception that has operated to prevent committee formation. As discussed above, when an organization's "political purposes" activities are limited to internal communications that expressly advocate for a candidate or a measure payments for these communications do not trigger formation. The Commission may wish to consider the implications of this change to this long-standing policy.

Under the second narrow approach, the regulatory language would take the form of amendments to existing regulations 18215 and 18225, which currently express the "newsletter exception," to reflect the expansion for other forms of communications. Rather than providing that committees are "outside the scope" of the statute it would define the term "organization" (further discussed below) to exclude committees for the purpose of clarifying that reporting rules for recipients committees would not change.

3. How does the distinct treatment of political party under section 85312 alter the analysis?

In presenting the various approaches to members of the regulated community, questions have been raised as to how the staff reconciles the second sentence of section 85312 with the approach that committees are outside the scope of the section, discussed above.

The second sentence provides as follows, "However, payments made by a political party for communications to its members who are registered with that party which would otherwise qualify as contributions or expenditures shall be reported in accordance with Article 2 (commencing with Section 84200) of Chapter 4, and Chapter 4.6 (commencing with Section 84600), of this title."

It has long been a practice by the Commission to distinguish between committees of a political party and other committees. For example, as previously noted, the definition of "contribution" as provided in subdivision (a)(2) of regulation 18215 delineates between a candidate, a candidate controlled committee, a political party, and an organization formed or existing primarily for political purposes, including but not limited to a political action committee established by any membership organization, labor union or corporation. The same is true of regulation 18225 defining the term "expenditure." (Regulation 18225(a)(2)). Under the regulations, a "political party" is presumed to receive contributions and make contributions and expenditures, but the entire party is not necessarily presumed to be "committee" for purposes of the Act. This may be because of its hybrid federal and state structure. Payments made or received by a political party would "otherwise qualify as contributions or expenditures" because the regulations expressly require that.

Since section 85312 does not identify the payers of payments for member communications, the second sentence merely serves two primary purposes: 1) it clarifies that political parties do fall under the section's purview without the need of any regulatory clarification regarding its hybrid status as both a political party and a membership organization, and 2) it clarifies that member communications by political parties trigger only certain reporting rules and do not trigger contribution or expenditure limits.

Nevertheless, there is a question regarding which entities should constitute a "political party" for purposes of section 85312, and should therefore be subject to reporting requirements of Chapters 4 and 4.6. The general view is that "political party" means "political party committee" as defined in section 85205. This section provides that:

> "'Political party committee' means the state central committee or county central committee of an organization that meets the requirements for recognition as a political party pursuant to Section 5100 of the Elections Code." (Section 85205.)

However, since this section is in Chapter 5, applicable to the "Limitations on Contributions" of the Act, this conclusion does not necessarily follow but it would function to separate the general committee analysis discussed above from political parties.

Decision 2: Does the second sentence of section 85312 alter the above analysis and should a regulation provide that for purposes of section 85312 the term "political party" means "political party committee" as defined in section 85205?

Decision 2 Staff Recommendation: The second sentence does not alter the analysis, but staff should draft regulatory language providing that, for purposes of section 85312, the term "political party" means "political party committee" as defined in section 85205. To conclude otherwise would mean the Commission wishes to subject political parties to the same analysis as other committees, in which case, staff would need to explore all the implications to political parties of this approach.

IV. Definitions - Regulation

Staff drafted a proposed regulation (Regulation 18531.7) defining a number of undefined terms used in section 85312. Without any definitional parameters, broad meanings for the terms used in this section could significantly affect the reporting, contribution limit, and voluntary expenditure schemes of the Act. The terms initially defined for purposes of this section by the proposed regulation are: "organization," "corporation," "shareholder," "employee," "family," "political party," "payments for communications," "payments for general public advertising," "membership organization," and "members." Staff would continue to refine the regulatory language with the following issues in mind.

A. "Organization": "Employer," "Corporation," "Membership Organization"

Section 85312 refers to members, shareholders, and employees of an organization. Employers and corporations are two types of organizations to whom this section clearly applies. However, an ambiguity exists as to which types of entities having "members" fall within the scope of section 85312. The staff would propose to define "organization" to specify that for purposes of section 85312, an "organization" includes a "membership organization," as to be defined. Since the term "organization" is not defined elsewhere in the Act and, since this term determines which entities may take advantage of the exceptions included in section 85312, the Commission may find it necessary to narrowly define such a term to preserve the fundamental goals of the Act as discussed above (Decision 1 discussion).

One of the key issues is what criteria should be used to determine who is a membership organization. Developing a definition for "membership organization" has proved to be a challenging undertaking due to the myriad of possible organizational structures that an entity comprised of members may have. A number of approaches are possible although each one has disadvantages. Providing a list of the types of entities which are "membership organizations" offers specific guidance in applying section 85312, yet this approach would undoubtedly leave out many bona fide "membership organizations" with active members. Another approach may be to identify the types of entities that should *not* be covered by section 85312. However, this approach would present the same problems as providing a list of entities that constitute "membership organizations."

One specific option is to present a general rule simply stating that any organization having members would qualify as a "membership organization," and therefore constitute an "organization" within the scope of section 85312. This definition provides for an extremely broad application of the section, resulting in any entity with more than one member being classified as a "membership organization." With this definition, the section 85312 exception would exempt any entity which could demonstrate that it had more than one member from the Act's reporting, contribution limit and voluntary expenditure rules.

Another option is to provide general criteria defining a bona fide "membership organization." This option is based on Federal Election Commission regulations and requires that members meeting express qualifications of the organization have the authority and ability, through access to the entity's organizational documents, to participate in the governance of the organization. Additionally, this definition would include only those membership organizations that solicit persons to become members rather than merely identifying persons as members who were never approached for membership. As such, this option would require the organization to acknowledge acceptance of membership so that a member has actual knowledge of his or her membership standing.

A third option would restrict the definition of "membership organization" to only those entities that are not operated for profit. This option would contend with a large business entity that, for profit making purposes, identifies as "members" a large base of customers who are eligible for certain discounts and to whom communication largely constitutes advertising to the general public. However, this option would not prevent such a business entity from applying section 85312 to communications to its employees if a proposed regulation does not exclude entities operated for profit from the definition of "employer."

B. Members - Should the regulatory criteria define "members"?

The definition for "members" to be presented in the proposed regulation could be based on Federal Election Commission regulations defining "members." The federal regulations were drafted for the purpose of limiting the persons who can lawfully be solicited for campaign contributions by a membership association or who can be the recipients of a political communication from a membership association without the communication constituting a campaign expenditure. While section 85312 serves the different purpose of providing an exception to the definitions of "contribution" and "expenditure," the federal regulations defining "members" include criteria which may prove useful for purposes of section 85312.[20]

A regulation could address persons who have an ownership interest in an organization and do not pay dues on a regular basis. For example, it could cover persons who gain membership by virtue of a onetime payment. It could also cover a more traditional type of member who pays membership dues on a regular basis. Finally, it would also cover persons who are construed as members without a monetary payment where the member has a demonstrated organizational attachment.

C. "Shareholder"

The question presented by the term "shareholder" is whether a shareholder must be an individual (natural person) as opposed to a "person" as defined by the Act. Section 82047 of the Act provides that "person" means an "individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert." Defining the term "shareholder" broadly to be a "person" pursuant to section 82047 could extend the exception of section 85312 to entities holding any equity interest in a corporation. The plain language of

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[20] Public comment at the August 15, 2001 Interested Persons Meeting and written comments submitted to the Commission neither uniformly support nor oppose the idea that the federal rules provide criteria which can be adapted for purposes of Section 85312. For example, while also pointing out some shortcomings in applying regulations which attempt to summarize the complex concept of membership, one commentator in particular noted: "As a general rule, the federal test meets the requirements of elasticity and functionality. And it fully addresses the issue of intermediate, statewide or national labor organizations or federations – such as building trades councils and county and state federations of labor – membership in which is technically made up of various labor organizations." (Zakson Comment Letter, August 15, 2001.)

section 85312 appears to negate this interpretation by expressly identifying "families" as recipients of communications pursuant to this section. The use of the word "families" indicates that "shareholders" would include only natural persons. The staff could specify that a shareholder would be an individual for purposes of this law.

D. "Family"

Section 85312 specifies that the exception from the definition of "contribution" or "expenditure" extends to payments for communications to "families" of members, employees, or shareholders of an organization. Since this section would seem to apply to communications received at residences, it appears that the term "families" signifies those individuals in a household. Consequently, the definition for "family" could use a term already defined in the Act. This is the term "household" already defined in section 89511(b)(4) in the "personal use of funds" context. For purposes of section 85312, "family" would be a member's, employee's, or shareholder's spouse, dependent children, and parents who reside with the member, employee, or shareholder.

E. Multi-level Organizational Structure

The question has arisen whether membership in one level of a membership organization which has a multi-level organizational structure constitutes membership in the other levels of the membership organization. The Commission may determine that direct membership in any level of a multi-tiered organization should be construed as membership in all tiers of the association in determining whether a person was a member of a particular membership organization. The rationale for this rule is that a person who joins one tier of a multi-tiered organization clearly demonstrates an intention to associate with the entire organization. On the other hand, certain organizations may have a membership or fee structure where membership in one level of an organization is distinct from membership in another. The Commission may wish to develop a separate rule dealing with membership organizations having these types of organizational structures.

F. "Payments for Communications"

Staff would propose that the term "payments for communications" be defined, but at this point would defer further discussion until the Commission determines the issues pertaining to the scope of the statute discussed above. In any event, staff would minimally propose that the definition be limited to payments that are made by a "membership organization." As defined, the communication must be made for the purpose of supporting or opposing a candidate or ballot measure, and the communication must be to the organization's members.

G. "Payments for general public advertising"

While it is foreseeable that individuals might receive a communication not intended for

them, a *de minimis* rule addressing unintended contact could be included in a definition of "payment for general public advertising." Section 85312 specifies that payments for communications will not fall within its exception if the payments are for "general public advertising."

Once disposing of the issue of whether there should be a *de minimis* rule, the Commission may choose to adopt a fixed *de minimis* amount based on either a specific dollar amount such as $100 or a percentage like 5% of the total expenditure(s) attributable to the communication. Regulation 18961 currently provides for a similar exception regarding the incidental use of campaign vehicles, real property, appliances, or equipment for purposes other than political, legislative, or governmental purposes.

Decision 3: Should the above terms be defined?

Decision 3 Staff Recommendation: The staff recommends that the Commission direct staff to continue development of regulatory language defining these terms.

V. Enforcement Concerns

To effectively implement this section, the Commission may direct that regulatory language prescribe mechanisms to ensure compliance with section 85312. Provisions regarding recordkeeping and earmarked funds may be of particular importance.

A. Recordkeeping

Without any requirements that an organization keep records documenting member communications which support or oppose a candidate or ballot measure, the Commission is unable to verify whether the payments are made for communications as contemplated by the statute. Under such circumstances, the Commission has no tools to monitor, or conduct an audit, to determine if an organization has complied with provisions of section 85312 or other sections of the Act. Consequently, the Commission may wish to direct staff to explore whether an organization availing itself of a benefit of section 85312 may be required to keep records documenting its conduct pursuant to this section for enforcement purposes.

Decision 4: Should staff be directed to develop recordkeeping rules to be used to monitor compliance with section 85312?

Decision 4 Staff Recommendation: Staff recommends that the Commission direct staff to establish recordkeeping requirements pursuant to section 85312.

B. Unidentified Mailers

If section 85312 is interpreted to provide an exception to the definition of "contribution" or "expenditure" for the purpose of committee formation, certain entities which qualified as committees prior to Proposition 34 may no longer qualify as committees. As a result, such an entity will no longer be required to comply with section 84305. This section prohibits, in part, a committee from sending a mass mailing without certain sender identification information. The lack of such a requirement would appear to open the door for mass mailings from unidentified sources and prevent the Commission and/or the public from being able to identify who sent a particular mailing.

To contend with this problem which may arise from section 85312, the Commission may want to develop indicia of "communications" contemplated by section 85312. One possible indicium is that a communication is clearly identified as having been sent by an "organization," as previously mentioned. Indicia of this sort is supported by staff and members of the regulated public have not voiced opposition. Such a rule would serve as a safe harbor for those organizations wishing to fully comply with the provisions and intent of section 85312.

Decision 5: Should indicia for "communications" for purposes section 85312 be developed?

Decision 5 Staff Recommendation: Staff recommends regulatory indicia describing a "communication" which includes the characteristic of being clearly identified as being sent by an "organization."

C. Earmarked Contributions

Because section 85312 provides a global exception to the definition of "contribution," this section also serves as an exception to the Act's contribution limits. Therefore, a possibility exists that this section may facilitate circumvention of the Act's contribution limits. For example, a person wishing to make a contribution in excess of the contribution limit to a candidate may give the excess amount to an organization to achieve the same goal. As a result, rules may be necessary to limit the scope of the exception, as determined by the Commission, to an organization's internal communications. The Commission may decide that communications directed or paid for by third parties would not be considered to be within the scope of the exception to prevent persons from using section 85312 to undermine the contribution limits of the Act.

Staff notes that there is difficulty relating to the interplay between sections 85312 and 85303(b), when the payment for member communications is made to a political party. Section 85303(b) provides that:

> "(b) A person may not make to any political party committee, and a political party committee may not accept, any contribution

> totaling more than twenty-five thousand dollars ($25,000) per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. Notwithstanding section 85312, this limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate's candidacy for elective state office."

This section may be read as applying where there is coordination only between a candidate and a political party for expenditures made by the party for communications. On the other hand, section 85303(b) may also be read to indicate that a candidate may behest individuals to make contributions of up to $25,000 *to* a political party which are earmarked for that candidate. Under this interpretation, it would not be possible to regard any such payments to a political party as a contribution from the individual to the candidate since this type of payment might otherwise have been limited to $3,000.[21]

Decision 6: Should the Commission develop regulatory language addressing earmarking of payments by third parties to persons governed by section 85312?

Decision 6 Staff Recommendation: The Commission may wish to adopt a regulation addressing earmarking for purposes of section 85312 and how it relates to political parties in section 85303.

VI. Section 85310 Consideration

Section 85310(a) provides:

> "Any person who makes a payment or a promise of payment totaling fifty thousand dollars ($50,000) or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, shall file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment…" [emphasis added.]

On behalf of California for Equality and Progress (Cal-LEAP), it has been suggested that a "gray area" exists with respect to reporting obligations arising by recipient committees where

[21] A person, other than a small contributor committee or a political party committee, may not make to any candidate for state elective office any contribution totaling more than $3,000. (Section 85301(a).)

membership communications identify a specific candidate, involve an expenditure of $50,000 or more and do not include express advocacy of the candidate. It has been suggested that so long as a membership organization's communication is limited to the organization's members, employees, shareholders, or families of its members, employees, or shareholders, the payment should not be reportable under section 85310. This is because Cal-LEAP believes the term "disseminated, broadcast, or otherwise published" is intended to reach only communications to the general public. As stated in the most recent letter by Cal-LEAP, dated December 4, 2001:

> "To hold otherwise would lead to the anomalous result that a membership communication that expressly advocates the election or defeat of a specifically identified candidate and is paid for by the organization itself is non-reportable, while a membership communication paid for by the organization itself that specifically identifies a candidate, but does not expressly advocate her/his election or defeat is reportable."

Staff has considered the arguments but is not certain that there is support for this proposition in the statute. Section 85310, by its terms applies, to a "payment" defined in section 82044 to mean "a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible." Section 85312 provides that payments are not contributions or expenditures; it does not provide that payments are not payments within the meaning of any section of the Act. The staff will further explore this issue if the Commission directs the staff to do so, however, with a view of further examining the terms "disseminated" and "otherwise published."

Decision 7: Should section 85312's effect, if any, on section 85310 be addressed in regulatory language interpreting section 85312?

Decision 7 Staff Recommendation: Staff recommends that any effect of section 85312 on section 85310 be clarified in a regulation interpreting section 85310 rather than section 85312. Regulation 18539.2 currently prescribes the reporting rules under the statute.